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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 ACADEMY OF OUR LADY OF
11 PEACE,

CASE NO. 09cv962-WQH-AJB
ORDER

12 vs. Plaintiff,
13 CITY OF SAN DIEGO; CITY COUNCIL
14 OF THE CITY OF SAN DIEGO; and
DOES 1 through 100, inclusive,

15 Defendants.

16 HAYES, Judge:

17 The matter before the Court is Plaintiff's Motion for Partial Summary Judgment and
18 Plaintiff's Motion for Permanent Injunction. (Doc. # 17, 25).

19 **I. Background**

20 On May 5, 2009, Plaintiff Academy of Our Lady of Peace ("OLP") initiated this action
21 by filing a Complaint in this Court against Defendant City Council of the City of San Diego
22 ("City Council") and Defendant City of San Diego (collectively, "City"). (Doc. # 1). OLP is
23 a nonprofit corporation which operates a Catholic, liberal arts, college-preparatory high school
24 for young women. (*Id.* ¶ 3). The Complaint alleges that OLP's "existing campus facilities are
25 woefully outdated and inadequate to meet OLP's mission" to educate and "inspire its students
26 to grow as committed Christians." (*Id.* ¶¶ 12-13). OLP proposed a "Modernization Plan ...
27 that would add two new facilities to the 84-year old campus: an approximately 20,545 square
28 foot, two-story classroom building on the west side of the campus, and a two-level, 104-space
parking structure on the east side of campus." (*Id.* ¶ 15). OLP's "Modernization Plan would

1 also require the demolition or removal of three single-family residences that OLP owns.” (*Id.*)
 2 In 2007, OLP applied to the City for an amendment to its existing “Conditional Use Permit”
 3 (“CUP”) and other use permits in order to implement OLP’s Modernization Plan. (*Id.* ¶ 16).
 4 On March 3, 2009, the City Council denied the use permits necessary to implement OLP’s
 5 Modernization Plan. (*Id.* ¶ 27). The Complaint alleges that “[t]he City’s action[s] in ...
 6 rejecting the Modernization Plan have effectively precluded OLP from meeting its classroom
 7 space and program needs at its current campus.... The City’s decision has imposed a
 8 substantial burden on OLP’s religious mission because it cannot provide the Catholic education
 9 it exists to provide.” (*Id.* ¶ 28).

10 The Complaint alleges thirteen causes of action related to the City’s March 3, 2009
 11 decision to deny the Use Permits. The first cause of action alleges a violation of the Religious
 12 Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”), 42 U.S.C. §2000cc, *et seq.*
 13 (*Id.* at 9). The next ten causes of action allege violations of OLP’s right to free exercise of
 14 religion, freedom of speech, freedom of association, equal protection and due process, as
 15 secured by the First and Fourteenth Amendments to the United States Constitution, and Article
 16 1, Sections 2-7 of the California Constitution. (*Id.* at 10-13). The first eleven causes of action
 17 seek compensatory damages, attorney fees and “an order declaring void the City’s decision to
 18 reject the Modernization Plan, and instead directing that [the] City issue Use Permits allowing
 19 the Modernization Plan.” (*Id.* at 16). The twelfth cause of action is a petition for writ of
 20 mandate pursuant to California Code of Civil Procedure § 1094.5, seeking an order directing
 21 the City to invalidate the March 3, 2009 City Council decision and issue the Use Permits
 22 necessary to implement the Modernization Plan. (*Id.* at 13-14). The thirteenth and final cause
 23 of action relates to the September 18, 2007 decision by an Administrative Law Judge
 24 employed by the City finding OLP in violation of the then-current CUP and ordering OLP to
 25 pay fines. (*Id.* at 14-16).

26 On May 26, 2009, Defendants filed a Motion to Dismiss the thirteenth cause of action
 27 of the Complaint. (Doc. # 6). On July 28, 2009, the Court granted the Motion to Dismiss and
 28 dismissed the thirteenth cause of action. (Doc. # 13).

1 On November 23, 2009, the Magistrate Judge conducted an Early Neutral Evaluation
 2 Conference. After the Conference, the Magistrate Judge issued an order which stated:

3 There are central legal issues which can be addressed early on by way of a
 4 motion for summary judgment. Plaintiff will be filing a motion for summary
 5 judgment on or before January 15, 2010. Defendant will be opposing and the
 6 Court sets a telephonic Case Management Conference for April 12, 2010 at 9:30
 7 a.m. to set further dates and deadlines as appropriate.... The record relative to
 the underlying dispute is complete and there is no need for disclosures under
 Rule 26 or formal discovery at this time. Should the Court find triable issues of
 fact do exist, any needed discovery can be dealt with after the dispositive
 motion.

8 (Doc. # 15 at 1).

9 On January 15, 2010, OLP filed the Motion for Partial Summary Judgment and the
 10 Motion for Permanent Injunction. (Doc. # 17, 25). OLP contends that it is entitled to
 11 judgment as a matter of law as to the Complaint's first cause of action that "the City violated
 12 ... RLUIPA ... when it rejected OLP's application for its 'Modernization Plan' ... in that the
 13 rejection imposed a substantial burden on the exercise of religion by OLP and its students and
 14 faculty." (Doc. # 17 at 1-2). According to OLP, "[i]f the Court grants summary judgment as
 15 requested, the [proposed permanent] injunction would command the City ... to approve the
 16 Modernization Plan in the form approved by the City's Planning Commission." (*Id.* at 2; *see also* Doc. # 25 at 1-2). OLP submitted numerous affidavits and exhibits in support of its
 17 motions. (Doc. # 17-26).

18 On February 17, 2010, the City filed an opposition to OLP's motions. (Doc. # 29). The
 19 City stated that "[d]ue to the limited nature of discovery and scope of this motion, Defendants
 20 rely exclusively on declarations and supporting documents submitted by Plaintiff." (*Id.* at 1).

21 On February 25, 2010, OLP filed a reply in support of its motions. (Doc. # 30).

22 On March 22, 2010, the Court conducted oral argument on OLP's pending motions.
 23 (Doc. # 31).

24 **II. Facts**

25 **A. OLP and Religion**

26 OLP is a Catholic high school for girls, the only single gender high school for girls in
 27 San Diego County. (Mahadevan Dec., ¶ 3, 2:23-24). OLP was founded in 1882 by the Sisters

1 of St. Joseph of Carondelet, an order of nuns dating back to France in 1650. (Anchondo Dec.,
 2 ¶ 2, 2:3-8). OLP purchased its present location, in the North Park area of San Diego, in 1925
 3 and moved its campus there in 1926. (Anchondo Dec., ¶ 2, 2:13-14, Ex. A:9-20). OLP's
 4 facilities have been consecrated and have long been used, and continue to be used, for religious
 5 services and activities. (Anchondo Dec., ¶ 2, 2:9-3:1, ¶ 4, 3:21-27). OLP's official Mission
 6 is "twofold: to assist and enable parents to fulfill their role as the primary educators, and to
 7 inspire its students to grow as committed Christians who are building Christ's kingdom of
 8 justice, love and peace" through a college-preparatory program. (Anchondo Dec., ¶ 3, 3:4-10).
 9 Crucifixes are present in every classroom. (Anchondo Dec., ¶ 5, 4:6). OLP requires students
 10 to pass a religious studies class each year to graduate. (Anchondo Dec., ¶ 4, 3:12-14). Each
 11 day begins with a prayer broadcast over the school's public address system, with additional
 12 prayers offered throughout the day. (Anchondo Dec., ¶ 5, 4:4-10). OLP's individual
 13 departments and classes are required to reflect OLP's religious purposes. (Anchondo Dec., ¶¶
 14 5-6). The City Council has repeatedly recognized OLP's religious nature and praised its value.
 15 (Mahadevan Dec., Ex. E:35-G:49).

16 **B. OLP's Facilities**

17 OLP's Principal stated in a declaration:

18 OLP's facilities are inadequate, both in themselves and in comparison to
 19 standards, to be able to provide this Catholic education. Meeting these standards
 20 and having facilities comparable to other schools are important because about
 21 98% of our graduates enroll in college.... I do not believe that OLP ... would be
 22 able to survive at all if we could not offer a competitive college-preparatory
 23 curriculum, for which we need the facilities in the Modernization Plan.

24 (Anchondo Dec., ¶ 7, 5:2-5; Ex. E:42).

25 OLP's Chief Financial Officer submitted a declaration outlining the following "specific
 26 problems" with OLP's current facilities:

27 (a) Religion teachers must float between classrooms, rather than having a
 28 dedicated religion classroom. (Mahadevan Dec., ¶ 9a, 5:3-6).

(b) There are fewer science labs than needed for OLP's students. (Mahadevan Dec., ¶ 9b, 5:7-18).

(c) The existing computer room is inadequately small and contains
 view-blocking pillars. (Mahadevan Dec., ¶ 9c, 5:19-23, Ex. D:32).

1 (d) OLP's arts studios are too small and subject to physical constraints such as
 2 structural pillars in the way. (Mahadevan Dec., ¶ 9d, 5:24–6:11, Ex. D:30,
 3 D:33).

4 (e) OLP's administrative offices are small and scattered from each other and
 5 the activities being supervised. (Mahadevan Dec., ¶ 9e, 6:12–17, Ex. D:31).

6 (f) OLP's library is smaller than OLP's students need. (Mahadevan Dec., ¶ 9f,
 7 6:18–22).

8 OLP's Chief Financial Officer stated that the Modernization Plan would have solved these
 9 specific problems, and “would have provided an integral campus with all parking, classroom
 10 and administrative space within a securable perimeter while preserving the historical areas of
 11 the campus and meeting our religious and operational needs for the foreseeable future.”
 12 (Mahadevan Dec., ¶ 9, 4:27–5:2).

13 OLP submitted declarations indicating that OLP's current campus is subject to unusual
 14 site constraints, including steep slopes, restricted fire access, and historic, architecturally-
 15 valuable buildings. (Lia Dec., ¶ 8, 6:9–22; Mahadevan Dec., ¶ 2, 2:9–11, 14–15; Marshall Dec.,
 16 ¶ 6, 4:6–10; McArdle Dec., ¶ 3a, 2:23–27; 3c–3f, 3:9–4:7). An architect submitted a
 17 declaration indicating that “OLP asked [his firm] to evaluate the merits of potential adaptive
 18 reuse of several existing buildings on campus, to convert current spaces into classroom and
 19 support uses so as not to need something like the Modernization Plan.” (McArdle Dec., ¶ 4,
 20 4:8–10). The architect stated that OLP's existing buildings do not meet structural standards
 21 for the proposed reuse, such as for height of classrooms, load bearing ability, ventilation, and
 22 compliance with disabled access requirements, and upgrades would be extensive and
 23 expensive. (McArdle Dec., ¶ 4a–4e, 4:21–6:12).

24 **C. City Planning Commission Decision**

25 OLP submitted its application for the Modernization Plan to the City in 2007. (Tunney
 26 Dec., ¶ 2–3, 2:5–22, Exs. A:8–F:45). The project went through extensive City review lasting
 27 over a year. (Tunney Dec., ¶ 4–6, 2:23–3:26, Exs. G:47–O:442). City staff determined that
 28 the Modernization Plan needed four use permits: a planned development permit for height,
 29 setback and use of tandem parking; a site development permit because part of the property
 30 contained steep slopes; an amendment to OLP's existing CUP to allow the school to have 750

1 students; and a neighborhood development permit, also for tandem parking. (Tunney Dec., ¶
 2 6, 3:14-23, Ex. N:206-207). OLP made frequent efforts to engage the community about the
 3 Modernization Plan. (Mahadevan Dec., ¶ 6, 3:15-24). OLP's architect stated that "OLP made
 4 numerous changes to its [Modernization Plan] proposal to accommodate, as best we could,
 5 neighbors' and City staff's concerns." (Mahadevan Dec., ¶ 8, 4:4-5).

6 In a report dated September 12, 2008, City staff recommended approval of the
 7 Modernization Plan. (Mahadevan Dec., ¶ 9, 4:24-25; Tunney Dec., Ex. N:204). The City staff
 8 report summarizes the Modernization Plan as follows:

9 The current campus facility includes eight structures and two surface parking
 10 lots, in a primarily Mediterranean-style design. Three existing single-family
 11 structures adjacent to the property have been purchased by AOLP over the years
 12 and are proposed for demolition and incorporation into the modernized campus
 13 with this permit.... The school has exceeded the allowed enrollment as specified
 14 in [the CUP in effect at the time], which has resulted in the issuance of a Civil
 15 Penalties Administrative Enforcement Order by the City.... In conjunction with
 16 the terms of that order, the school is processing this permit request. The
 17 proposed development is proposed to address the current and future operational
 18 and academic needs of the school. ...
 19

20 The proposed project is a request for a Planned Development Permit, Site
 21 Development Permit, Conditional Use Permit and Neighborhood Development
 22 Permit to allow: a maximum annual enrollment of 750 students; demolition of
 23 three existing residential structures; construction of an approximately 21,059-
 24 square-foot, two-story classroom building; and construction of a new, two-level
 25 parking structure on the site. ...
 26

27 The applicant has stated that their primary objective in proceeding with this
 28 'master plan' project is to modernize the Academy of Our Lady of Peace school
 29 and to allow the school to remain competitive in the current educational
 30 environment in San Diego. Recently opened parochial high schools in the area
 31 ... offer state of the art facilities, and the ability to attract new students to AOLP
 32 has become a challenge.... Currently, classrooms at the school are tucked into
 33 nooks, attics, closets, etc., in structures that were originally residences. While
 34 several classroom buildings were added over the years and the conversion of a
 35 former dormitory was accomplished, many current spaces used for classrooms
 36 are of inadequate size for normal education classroom functions.
 37

38 (Tunney Dec., Ex. N:205-206). The staff report contains a statement from the Chair of the
 39 Urban Design/Project Review Subcommittee of the North Park Planning Committee, which
 40 states that the Subcommittee "voted to deny the project and the CUP amendment by a vote of
 41 6-3-0." (Tunney Dec., Ex. N:211). The staff report states that "[t]he project is the subject of
 42 intense community interest." (*Id.*) The community concerns identified in the report involved
 43 parking issues and the proposal to "demolish three existing residential structures; two of which
 44

1 have been determined to be locally significant based on their architectural features. The
 2 applicant has considered adaptive reuse of these structures, but based on classroom size
 3 requirements and library facility requirements, has determined these are not viable options.
 4 Accordingly, this situation has resulted in significant unmitigated impact. The decisionmaker
 5 will be required to make a Statement of Overriding Considerations in order to grant this
 6 request.” (Tunney Dec., Ex. N:211-212).

7 OLP submitted memoranda and exhibits to the City Planning Commission stating
 8 OLP’s position that its current facilities were inadequate and that adaptive reuse of OLP’s
 9 existing facilities would not suffice. (Tunney Dec., Exs. O:395-414; P:444-447, 459-463,
 10 470-471, 483-485).

11 On October 9, 2008, the City’s Planning Commission voted 5-0 to approve the
 12 Modernization Plan with conditions. (Mahadevan Dec., ¶ 9, 4:24-25; Tunney Dec., ¶ 8, 4:6-7,
 13 Ex. S:542-554). A local ad hoc group, called “Between the Heights,” and the North Park
 14 Planning Committee, the City’s official community planning group for the area, appealed the
 15 Planning Commission’s decision to the City Council. (Mahadevan Dec., ¶ 9, 4:25-26; Tunney
 16 Dec., ¶ 8, 4:7-9).

17 The City Council continued its hearing once to get more information and allow OLP
 18 and the project’s opponents to attend mediation. (Tunney Dec., Ex. R:535; Williamson Dec.,
 19 Ex. A:8:13-16). The project’s opponents declined the mediation suggested by the
 20 councilmember even though OLP had offered to pay for it. (Williamson Dec., Ex. A:10:9-10,
 21 A:11:10-23, A26:5-10). The opponents’ representative explained that the community members
 22 “feel like they’ve been going through mediation for three years, and they’ve given everything
 23 they have to give. They’ve agreed to everything that [OLP] was requesting in terms of square
 24 footage, in terms of facilities. The only request that they have is that [OLP] preserve[s] the
 25 three homes....” (Williamson Dec., Ex. A:11:14-19).

26 **D. City Council Decision**

27 During a meeting on March 3, 2009, the City Council voted on the permits necessary
 28 to implement OLP’s Modernization Plan. (Williamson Dec., Ex. A:41:8-12). During the

1 meeting, the following findings were made by Councilmember Todd Gloria:

2 Although the proposed project would implement objectives in the Greater North
 3 Park Community Plan for providing high-quality educational facilities and
 4 preserving open space and hillsides, the proposed project would eliminate two
 5 historic buildings located in the immediate neighborhood, located at 2544
 6 Collier Avenue and 2765 Copley Avenue. According to the project's
 7 Environmental Impact Report, the proposal to remove the two architecturally
 8 significant structures conflicts with the community plan's objective in the urban
 9 design element for preserving the architectural variety and residential character
 10 of the Greater North Park community and preserving and restoring unique or
 historic structures within the community. The two structures have been
 characterized and associated with the Spanish eclectic architectural style, and
 their loss, as proposed by the project, would result in significant and unmitigable
 impact as stated in the [Environmental Impact Report]. Therefore, the project's
 proposal to remove the architecturally significant structures would adversely
 impact the Greater North Park Community Plan's objectives for preserving
 architectural variety and historic structures within the community, and this
 finding cannot be made.

11 (Williamson Dec., Ex. A:19:1-25, A:20:1-13). Councilmember Gloria stated:

12 Based upon these findings and on the findings of the information
 13 contained in the staff report, I move that the Planned Development Permit
 14 Number 450668 and Site Development Permit Number 450706 be denied, and
 Conditional Use Permit Number 450705 and the Neighborhood Development
 Permit Number 590185 be granted in the form, exhibits, terms and conditions
 as set forth in Permit Number 450705.

15 And based upon Staff's comments today, my motion does not include
 16 adoption of the statement of overriding considerations. Additionally, my motion
 17 includes two permit conditions that I'd like to add: First, that ... amendment to
 18 the CUP [and] NDP is required prior to the issuance of demolition or relocation
 19 permits for any building more than 45 years old located within the project
 boundaries; and Second, that within 60 days of the approval of the permit,
 Exhibit A shall be revised to reflect the City Council's actions including
 identifying buildings which are to remain to the satisfaction of City Staff.

20 Even though it's my intention that the Site Development Permit and the
 21 Project Development Permit be denied, I want to be clear that I feel a project
 here is warranted, and I'm hopeful that OLP will bring forward a project that
 will enable it to meet the programmatic needs of its students while preserving
 the character of the surrounding community.

22 I'm confident that this can be done and that, when it is, I'm confident that
 23 it will receive the support of the surrounding neighborhood and the Planning
 24 Committee. I find -- I just think that's entirely doable, but I don't know that that
 25 can be done today under these circumstances. With that, I restate my motion
 26 that the Council modify the Planning Commission's decision by denying the
 27 PDP and SDP but approving the CUP and NDP. This motion includes certifying
 28 the [Environmental Impact Report] and adopting the [Mitigation Monitoring and
 Reporting Program] for the no project/no development alternative with a
 modification for the parking described in that alternative as detailed in the
 revised permit and the [Mitigation Monitoring and Reporting Program] and that
 this motion is based on the findings already read into the record.

1 (Williamson Dec., Ex. A:20:14-25, A:21:1-25, A:22:1-2). The reference to “a modification
 2 for the parking” is further explained in the relevant Mitigation Monitoring and Reporting
 3 Program report: “[T]he parking deficit of 47 spaces ... would be eliminated by provision of 104
 4 parking spaces via a combination of restriping of the existing on-campus parking areas and
 5 designated off-site parking areas ... within 60 days [from] the March 3, 2009 City Council
 6 Hearing.” (Tunney Dec., Ex. T:580). The Mitigation Monitoring and Reporting Program
 7 report contains additional provisions mitigating “impacts associated with Transportation and
 8 Circulation.” (Tunney Dec., Ex. T:580; *see also id.* at T:600-602).

9 Councilmember Gloria’s motion was passed by the City Council by a vote of 5-3.
 10 (Williamson Dec., Ex. A:41:8-12).

11 In its written resolution memorializing the City Council decision, the City Council
 12 stated that “[t]he originally proposed project was a master plan to allow the school to address
 13 its operational and academic needs as a college preparatory school”; “[a] primary goal of the
 14 project is to ensure a safe, secure campus for the student population by providing additional
 15 on-site parking”; and “[t]he original proposed development plan would have improved the
 16 educational opportunities of residents attending the school and ensure the continuing viability
 17 of AOLP and continue the school’s contributions to the community.” (Tunney Dec., Ex.
 18 U:608-609, U:611). The City Council resolution also memorialized the findings made by
 19 Councilmember Gloria at the March 3, 2009 City Council meeting, quoted above, concluding
 20 that “the project’s proposal to remove the [two] architecturally significant structures would
 21 adversely impact the Greater North Park Community Plan’s objectives for preserving
 22 architectural variety and historic structures within the community....” (Tunney Dec., Ex.
 23 U:608, U:612-613).

24 **E. The Houses**

25 OLP owns the three houses at issue. (Mahadevan Dec., ¶ 2, 2:15-17). The City agreed
 26 that one of the three houses is not historically or architecturally significant. (Williamson Dec.,
 27 Ex. A:19:8-12). The City viewed the two remaining houses as significant based upon their
 28 architectural style. (Tunney Dec., Ex. Q:499, Ex. N:209). According to the City’s study, there

1 are at least a dozen architecturally similar houses within a few blocks of the OLP-owned
 2 houses at issue. (Lia Dec., ¶ 3, 3:8–4:6, Exs. E:180–F:196). The historic regulations of the
 3 City, state and federal governments allow the removal (i.e., relocation) of architecturally
 4 significant structures. (Lia Dec., ¶ 5, 4:14–5:7, Ex. H:211-212). The City has authorized the
 5 relocation of at least nine historic structures since 1995, including two to sites out of the City.
 6 (Lia Dec., ¶ 6, 5:8-23). The City has authorized the demolition of at least five historic
 7 structures since 1995. (Lia Dec., ¶ 7, 5:24–6:8).

8 On September 6, 2007, OLP’s board of directors adopted a resolution pursuant to
 9 California Government Code § 37361 barring the City from designating the three houses as
 10 historic on the basis of OLP suffering a substantial hardship.¹ (Mahadevan Dec., ¶ 13,
 11 7:24–8:2, Ex. C:23-24; Lia Dec., ¶ 4, 4:7-13, Ex. G:198-199). The City has not questioned the
 12 validity of this resolution. (Mahadevan Dec., ¶ 13, 8:2-3). The City staff report states: “The
 13 Board of Directors of [OLP] adopted a [resolution] of financial hardship pertaining to a
 14 religious exemption of [OLP] property from designation as a historical resource pursuant to
 15 Government Section 37361. Therefore, 2544 Collier Avenue and 2746 Copley Avenue
 16 properties are not, or would not be, listed in the City’s or other historical register; however,
 17 disclosure of the impacts is required under [the California Environmental Quality Act
 18 (“CEQA”)].” (Tunney Dec., Ex. N:209).

19 **F. Heritage Plan**

20 Some opponents of the Modernization Plan wanted OLP to hire David Marshall as an
 21 architect to propose a plan that would not require demolishing the houses. (Mahadevan Dec.,
 22 ¶ 14, 8:4-6; Williamson Dec., Ex. A:30:19–31:12). During the pendency of this litigation,
 23 OLP hired Marshall and his firm (“Heritage”) to perform that study. (Mahadevan Dec., ¶ 14,
 24 8:6-8; Marshall Dec., ¶ 5, 3:2-19). Heritage proposed a plan that did not require removal the

25 ¹ California Government Code § 37361 prohibits the involuntary historical designation
 26 of a “noncommercial property owned by any association ... that is religiously affiliated,”
 27 provided the association ... objects to the designation and “the association ... determines in a
 28 public forum that it will suffer substantial hardship, which is likely to deprive the association
 ... of economic return on its property, the reasonable use of its property, or the appropriate use
 of its property in the furtherance of its religious mission, if the application is approved.” Cal.
 Gov. Code § 37361(c).

1 three houses. (Mahadevan Dec., ¶ 14, 8:8-9; Marshall Dec., ¶ 6, 3:20-22, Ex. A).

2 OLP contends that the Heritage plan is infeasible for the following reasons:²

3 (a) The Heritage plan would require finding an alternative location, at great
4 expense, for about half of OLP's classes for the year or two it would take to
construct. (Mahadevan Dec., ¶ 14a, 8:11-20; Marshall Dec., ¶ 6a, 3:24-4:5).

5 (b) The Heritage plan increases the cost of the project by about eight million
6 dollars, which OLP cannot foresee raising. (Mahadevan Dec., ¶ 14b, 8:21-22;
7 Leverton Dec., ¶ 2, 2:10-12; Marshall Dec. Ex. A:76, 101). However, the cost
of potential mitigation measures in the event the three houses are demolished has
not been determined. (Marshall Dec., ¶ 6c, 4:13-14).

8 (c) The Heritage plan would divide the school's library into small spaces,
9 impairing instructional value and necessitating the hiring of supervisory staff.
(Mahadevan Dec., ¶ 14c, 8:23-26; Marshall Dec., ¶ 6e, 4:18-21).

10 (d) The Heritage plan would provide fewer parking spaces than the City had
11 required. (Mahadevan Dec., ¶ 14d, 8:27-9:2; Marshall Dec., ¶ 6f, 4:22-26, Ex.
A:58).

12 (e) The Heritage plan requires disruptive construction in the center of campus,
13 while the Modernization Plan's construction was on the campus's periphery.
(Mahadevan Dec., ¶ 14e, 9:3-5).

14 (f) The Heritage plan would require additional effort to provide an integral (i.e.,
15 secure) campus. (Marshall Dec., ¶ 6d, 4:15-17).

16 (g) Pursuing approval of the Heritage plan would require additional time and
17 cost for City review and risk further litigation. (Mahadevan Dec., ¶ 14f-h,
9:6-13; Marshall Dec., ¶ 6a, 4:3-5).

18 (h) The Heritage plan raises its own issues about affecting potentially historic
19 and architecturally valuable buildings. (Mahadevan Dec., ¶ 14i, 9:14-17;
McArdle Dec., ¶ 4e, 6:9-12; Marshall Dec., Ex. A:57).

III. Discussion

A. Standard of Review

Summary judgment is proper when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c). An issue of fact is “genuine” only if there is sufficient evidence for a reasonable fact-finder to find for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). A fact is “material” if it may affect the outcome of

² The City contends that it cannot respond to the facts related to the Heritage plan “until formal discovery has been completed.” (Doc. 29-1 at 14-16).

1 the case. *See id.* at 248.

2 “When the party moving for summary judgment would bear the burden of proof at trial,
 3 it must come forward with evidence which would entitle it to a directed verdict if the evidence
 4 went uncontested at trial. In such a case, the moving party has the initial burden of
 5 establishing the absence of a genuine issue of fact on each issue material to its case.” *Miller*
 6 *v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 987 (9th Cir. 2006) (quotation omitted). “Once the
 7 moving party comes forward with sufficient evidence, the burden then moves to the opposing
 8 party, who must present significant probative evidence tending to support its claim or defense.”
 9 *C.A.R. Transp. Brokerage Co., Inc. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000)
 10 (citation omitted).

11 In ruling on a motion for summary judgment, “all justifiable inferences are to be drawn
 12 in [the non-moving] party’s favor.” *Hunt v. Cromartie*, 526 U.S. 541, 552 (1999) (quotation
 13 omitted). At the summary judgment stage, “[c]redibility determinations, the weighing of the
 14 evidence, and the drawing of legitimate inferences from the facts are jury functions, not those
 15 of a judge.” *Anderson*, 477 U.S. at 255.

16 “Simply because the facts are undisputed does not make summary judgment
 17 appropriate. Instead, where divergent ultimate inferences may reasonably be drawn from the
 18 undisputed facts, summary judgment is improper.” *Miller*, 454 F.3d at 988 (citation omitted).

19 **B. Contentions of the Parties**

20 In the Motion for Summary Judgment, OLP contends that the City violated RLUIPA
 21 by denying OLP’s application for the permits needed to implement the Modernization Plan.
 22 OLP contends: “RLUIPA applies because the City’s actions affect commerce and because the
 23 City’s actions implemented local land use rules”; “OLP is attempting to exercise its and its
 24 students’ religious rights”; “the City imposed a substantial burden on these religious
 25 activities”; and “the City did not tailor its actions to a compelling interest.” (Doc. # 17-1 at 6,
 26 8, 12, 13). In the Motion for Permanent Injunction, OLP requests an injunction that “would
 27 command the City, including its agents, employees and those acting on its behalf or in concert
 28 with it, to approve without delay all discretionary permits necessary for OLP to proceed with

1 OLP's 'Modernization Plan' in the form approved by the City's Planning Commission." (Doc.
 2 # 25 at 1-2). "OLP makes this motion [for permanent injunction] on the grounds that, upon
 3 the Court's grant of partial summary judgment that the City violated ... RLUIPA ... by
 4 imposing a substantial burden on the free exercise of religion when the City Council rejected
 5 OLP's application for its 'Modernization Plan,' issuance of the requested injunction is
 6 necessary to ensure compliance with RLUIPA." (Doc. # 25 at 2).

7 The City contends:

8 OLP's motion must be denied because Plaintiff has not shown the City's action,
 9 which allows Plaintiff to retain its entire existing *and projected* student body
 10 within the existing facilities successfully used to date by Plaintiff to
 11 accommodate the same 750 students, constitutes a substantial burden on its
 12 exercise of religion. This defect is further magnified by the fact that the City
 13 neutrally applied historical preservation laws and because the parking
 14 structure—covering two of the three controversial buildings—is not protected by
 15 RLUIPA. Moreover, the City's obligation to abide by state historic preservation
 16 guidelines under CEQA constitutes a compelling interest, and the City's
 17 requirement that if feasible, Plaintiff allow the historic structures remain onsite,
 18 constitutes the least restrictive alternative available to the City.

19 (Doc. # 29 at 3 (citations omitted)).

20 C. RLUIPA

21 RLUIPA establishes the following "general rule":

22 No government shall impose or implement a land use regulation in a manner that
 23 imposes a substantial burden on the religious exercise of a person, including a
 24 religious assembly or institution, unless the government demonstrates that
 25 imposition of the burden on that person, assembly, or institution –

- 26 (A) is in furtherance of a compelling governmental interest; and
- 27 (B) is the least restrictive means of furthering that compelling
 28 governmental interest.

29 42 U.S.C. § 2000cc(a)(1). This general rule "applies in any case in which":

- 30 (A) the substantial burden is imposed in a program or activity that receives
 31 Federal financial assistance, even if the burden results from a rule of general
 32 applicability;
- 33 (B) the substantial burden affects, or removal of that substantial burden would
 34 affect, commerce with foreign nations, among the several States, or with Indian
 35 tribes, even if the burden results from a rule of general applicability; or
- 36 (C) the substantial burden is imposed in the implementation of a land use
 37 regulation or system of land use regulations, under which a government makes,
 38 or has in place formal or informal procedures or practices that permit the
 39 government to make, individualized assessments of the proposed uses for the

1 property involved.

2 42 U.S.C. § 2000cc(a)(2).

3 The plaintiff bears the burden of persuasion on whether RLUIPA's general rule applies,
 4 and whether the land use regulation at issue imposes a "substantial burden" on plaintiff's
 5 "religious exercise." 42 U.S.C. § 2000cc-2(b). If plaintiff successfully carries its burden, the
 6 government bears the burden of persuasion on whether the imposition of the "substantial
 7 burden" is in furtherance of a compelling governmental interest, and is the least restrictive
 8 means of furthering that compelling governmental interest. *See id.*; *see also* 42 U.S.C. §
 9 2000cc(a)(1).

10 **1. Applicability of RLUIPA**

11 OLP contends that RLUIPA applies because "the substantial burden affects ...
 12 commerce with foreign nations, among the several States." 42 U.S.C. § 2000cc(a)(2)(B). OLP
 13 has submitted evidence that OLP draws students from Mexico each year and has alumnae
 14 throughout the United States. (Mahadevan Dec., ¶ 3, 2:20-21, 2:24-28).

15 The City does not contest this evidence or OLP's contention that RLUIPA applies
 16 pursuant to 42 U.S.C. § 2000cc(a)(2)(B).

17 Accordingly, the Court concludes that RLUIPA applies in this case.

18 **2. Religious Exercise**

19 RLUIPA defines "religious exercise" as "any exercise of religion, whether or not
 20 compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). "The
 21 use, building, or conversion of real property for the purpose of religious exercise shall be
 22 considered to be religious exercise of the person or entity that uses or intends to use the
 23 property for that purpose." 42 U.S.C. § 2000cc-5(7)(B).

24 OLP has submitted evidence indicating that OLP's existing classrooms—and the
 25 construction of new classrooms—fit within RLUIPA's definition of "religious exercise."
 26 (Anchondo Dec., ¶¶ 3-6). The City does not contest that the Modernization Plan's proposed
 27 construction of a two-story classroom building fits within RLUIPA's definition of "religious
 28 exercise."

1 The Court concludes that OLP has demonstrated, as a matter of law, that the proposed
 2 construction of a classroom building fits within RLUIPA's definition of "religious exercise."
 3 *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)
 4 ("Inasmuch as [the plaintiff] intends to convert the [p]roperty from hospital use to a place for
 5 religious education, it appears that a 'religious exercise' is involved in this case.").

6 **3. Substantial Burden**

7 "[A] 'substantial burden' must place more than an inconvenience on religious exercise."
 8 *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 988 (9th Cir. 2006) (quotation
 9 omitted). "For a land use regulation to impose a 'substantial burden,' it must be 'oppressive'
 10 to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must
 11 impose a significantly great restriction or onus upon such exercise." *Id.* (quoting *San Jose*
 12 *Christian College*, 360 F.3d at 1034). "[D]etermining whether a burden is substantial (and if
 13 so whether it is nevertheless justifiable) is ordinarily an issue of fact ... and ... substantiality is
 14 a relative term—whether a given burden is substantial depends on its magnitude in relation to
 15 the needs and resources of the religious organization in question." *World Outreach*
 16 *Conference Ctr. v. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009); *cf. Shakur v. Schriro*,
 17 514 F.3d 878, 891 (9th Cir. 2008) ("On this record, where there is factual dispute as to the
 18 extent of the burden on Shakur's religious activities, the extent of the burden that would be
 19 created by accommodating Shakur's request, and the existence of less restrictive alternatives,
 20 we cannot conclude that summary judgment on the RLUIPA claim was appropriate.").

21 OLP contends that "[r]ejecting the Modernization Plan substantially burdened the
 22 exercise of religion.... The Modernization Plan would have solved OLP's existing problems,
 23 which include rooms that are cramped, undersized, and for some purposes simply absent;
 24 spaces that contain pillars blocking students' views; and ... the absence of a secure perimeter."
 25 (Doc. # 17-1 at 8-9). The City contends that "OLP's motion must be denied because Plaintiff
 26 has not shown the City's action, which allows Plaintiff to retain its entire existing *and*
 27 *projected* student body within the existing facilities successfully used to date by Plaintiff to
 28 accommodate the same 750 students, constitutes a substantial burden on its exercise of

1 religion.” (Doc. # 29 at 3 (citations omitted)).

2 Viewing all reasonable inferences in the City’s favor, the Court concludes that OLP has
 3 failed to show that it is entitled to judgment as a matter of law as to whether the City imposed
 4 a substantial burden on OLP’s religious exercise. *See Miller*, 454 F.3d at 988 (“Simply
 5 because the facts are undisputed does not make summary judgment appropriate. Instead,
 6 where divergent ultimate inferences may reasonably be drawn from the undisputed facts,
 7 summary judgment is improper.”) (citation omitted). OLP has submitted evidence from which
 8 a reasonable jury could find that OLP’s facilities are “inadequate” (Doc. # 17-1 at 3) and
 9 “cramped” (*id.* at 8). However, in light OLP’s successful operation of the school for many
 10 years at or near its current and projected enrollment (Mahadevan Decl., Ex. F at 39, Doc. # 19),
 11 a reasonable jury could find that the City’s actions did not “impose a significantly great
 12 restriction or onus upon [OLP’s religious] exercise.” *Guru Nanak*, 456 F.3d at 988; *see*
 13 *Hillcrest Christian Sch. v. City of Los Angeles*, No. 05cv8788, 2007 WL 4662042, at *5-*6
 14 (C.D. Cal., July 12, 2007) (“In *Guru Nanak*, the substantial burden stemmed in part from the
 15 fact that, absent a CUP, the [plaintiff] lacked a temple in which to hold services. For the
 16 [plaintiff in *Guru Nanak*], the ultimate denial of a CUP placed its very existence in question.
 17 Hillcrest does not face the same dire burdens of uncertainty. Hillcrest already operates a
 18 school through which, by its own accounts, it prodigiously exercises its religious beliefs.”)
 19 (finding, after a bench trial, that despite the claimed “onus of Hillcrest continuing to operat[e]
 20 within ... an inadequate and cramped facility,” the city’s denial of permits necessary to build
 21 a new campus for a religious school did not amount to a substantial burden under RLUIPA);
 22 *see also Int’l Church of Foursquare Gospel v. City of San Leandro*, 632 F. Supp. 2d 925, 941
 23 (N.D. Cal. 2008) (granting the defendant city’s motion for summary judgment on a RLUIPA
 24 claim despite the plaintiff’s argument that “the Church’s core functions are being inhibited by
 25 the inadequate facility in which the City has forced it to remain”) (quotations omitted).

26 OLP has not submitted evidence that the burden is sufficiently substantial that the Court
 27 would conclude that OLP is entitled to judgment as a matter of law. *Cf. Guru Nanak*, 456 F.3d
 28 at 989 (affirming the grant of summary judgment for plaintiff, agreeing that the county

1 imposed a substantial burden “based on two considerations: (1) that the County’s broad
 2 reasons given for its tandem denials could easily apply to all future applications by Guru
 3 Nanak; and (2) that Guru Nanak readily agreed to every mitigation measure suggested by the
 4 Planning Division, but the County, without explanation, found such cooperation insufficient”);
 5 *Grace Church of North County v. City of San Diego*, 555 F. Supp. 2d 1126, 1136 (S.D. Cal.
 6 2008) (granting summary judgment in favor of plaintiff on its RLUIPA substantial burden
 7 claim, stating: “At various levels of Defendants’ mandatory CUP process, Grace Church
 8 experienced outright hostility to its application, decision-making that is seemingly arbitrary
 9 or pretextual, and ignorance regarding the requirements of controlling federal law regarding
 10 the application of land use laws to religious institutions.”); *Elsinore Christian Ctr. v. City of*
 11 *Lake Elsinore*, 291 F. Supp. 2d 1083, 1090 (C.D. Cal. 2003) (granting summary judgment in
 12 favor of plaintiff on a RLUIPA claim because “[t]he burden on the Church’s use of land in this
 13 case is not only substantial, but entire. By denying the conditional use permit, the City has
 14 effectively barred any use by the Church of the real property in question.”).

15 The Court concludes that OLP has failed to “come forward with evidence which would
 16 entitle it to a directed verdict if the evidence went uncontested at trial” as to the issue of
 17 whether the City imposed a substantial burden on OLP’s religious exercise. *Miller*, 454 F.3d
 18 at 987. Accordingly, OLP’s pending motions are denied.

19 **IV. Conclusion**

20 IT IS HEREBY ORDERED that Plaintiff’s Motion for Partial Summary Judgment is
 21 **DENIED** (Doc. # 17), and Plaintiff’s Motion for Permanent Injunction is **DENIED** (Doc. #
 22 25).

23 DATED: April 1, 2010

24 
 25 **WILLIAM Q. HAYES**

26 United States District Judge